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7 The Honorable Kymberly K. Evanson
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DON'T CAGE OUR OCEANS, et al.,

) Case No. 2:22-CV-01627-KKE

Plaintiffs,

)
)
v.
) DEFENDANTS' MOTION TO LIMIT
UNITED STATES ARMY CORPS OF
ENGINEERS, et al.,
) REVIEW TO THE
ADMINISTRATIVE RECORD

)
Defendants.

) NOTE ON MOTION CALENDAR:
OCTOBER 13, 2023
)
)

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12 16 U.S.C. § 1536(a)(2) 1

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17 5 U.S.C. § 706(2)(A) 4, 5

18 **REGULATIONS**

19 50 C.F.R. §§ 402.13 2

20 **OTHER AUTHORITIES**

21 85 Fed. Reg. 57298 (Sept. 15, 2020) 2

22 86 Fed. Reg. 2744 2

This case involves review of Defendants United States Army Corps of Engineers’ (“Corps”) and Scott A. Spellmon’s, in his official capacity as Chief of Engineers and Commanding General of the Corps (collectively, “Federal Defendants””), compliance with several laws in the most-recent implementation of the Corps’ Nationwide Permit Program. Because review of such an action is limited to the administrative record, Federal Defendants hereby move the Court to limit review to the administrative record.

STATUTORY BACKGROUND

1. The Rivers and Harbors Act

Section 10 of the Rivers and Harbors Act of 1899 prohibits structures or work in or affecting navigable waters, unless authorized by the Corps. 33 U.S.C. § 403. The Corps authorizes such structures and work through individual and general permits. The Corps may issue “Nationwide Permits” (“NWP”), a type of general permit, for certain specified activities. *Id.* §§ 325.5(c)(2); 330.1(b). Under a NWP, “[i]f certain conditions are met, the specified activities can take place without the need for an individual or regional permit.” *Id.* § 325.5(c)(2).

2. Endangered Species Act

Section 7(a)(2) of the Endangered Species Act (“ESA”) requires each federal agency, “in consultation with” the Services (either the National Marine Fisheries Service (“NMFS”) or the Fish and Wildlife Service), to “insure that any action authorized, funded, or carried out” by the agency “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of designated critical habitat. 16 U.S.C. § 1536(a)(2). If the so-called “action agency” determines that its action “may

1 affect" endangered or threatened species (listed species), it must pursue either informal or formal
 2 consultation with the appropriate Service. 50 C.F.R. §§ 402.13, 402.14(b)(1).

3 FACTUAL AND PROCEDURAL BACKGROUND

4 The Corps issued nationwide permit 56 ("NWP 56") to authorize specified activities
 5 pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403. 86 Fed. Reg.
 6 2744, 2744 (Jan. 13, 2021). NWP 56 authorizes structures and work in navigable waters of the
 7 United States, including federal waters over the outer continental shelf, for finfish mariculture
 8 activities. *Id.* at 2807. NWP 56 was issued after an extensive administrative review process,
 9 including notice and comment rulemaking. *Id.* During notice and comment rulemaking, any
 10 interested party had a right to submit information to the Corps for consideration. 85 Fed. Reg.
 11 57298 (Sept. 15, 2020). The Corps considered all information it received and that information
 12 became part of the Corps' administrative record for NWP 56. *See* 86 Fed. Reg. at 2807
 13 (responding to comments received on NWP 56).

14 Plaintiffs Don't Cage Our Oceans, Pacific Coast Federation of Fishermen's Associations,
 15 Institute for Fisheries Resources, Quinault Indian Nation, Los Angeles Waterkeeper, San Diego
 16 Coastkeeper, Santa Barbara Channelkeeper, Wild Fish Conservancy, Recirculating Farms
 17 Coalition, Center for Food Safety, and Food & Water Watch (collectively, "Plaintiffs") filed this
 18 suit challenging NWP 56. ECF No. 14. Plaintiffs' complaint alleges several statutory violations,
 19 including one claim alleging failure to consult under the ESA. *Id.* at 79-91. Federal Defendants
 20 filed the administrative record for NWP 56 on May 1, 2023. ECF No. 28. Under the terms of
 21 the Court's scheduling order, by June 9, 2023, Plaintiffs were to "identify any documents,
 22 beyond those in the Corps' certified administrative record for NWP 56, that they propose should
 23 be considered as part of the adjudication of the ESA claim." ECF No. 30 at 2. Pursuant to the

1 Court's scheduling order, the parties conferred regarding the contents of the administrative
 2 record, which resulted in the Federal Defendants filed a revised index to the administrative
 3 record on August 4, 2023. ECF No. 33.

4 After filing the revised index, Plaintiffs informed the Federal Defendants that they would
 5 move for judicial notice of three documents (two aquaculture atlases prepared by NMFS and a
 6 2014 biological opinion prepared by NMFS). Declaration of Maggie Baker Smith ("Smith
 7 Decl.") Ex. 1. The Plaintiffs confirmed that they would not be seeking to introduce any other
 8 extra-record materials in the litigation. *Id.* The parties conferred over the potential motion for
 9 judicial notice, but Federal Defendants could not consent to the Plaintiffs' request. *Id.* The
 10 parties sought additional time from the Court to continue discussions before submitting a
 11 proposed summary judgment briefing schedule. ECF No. 34 (filed September 8, 2023). On
 12 September 13, 2023, for the first time, Plaintiffs informed the Federal Defendants that they
 13 would seek to introduce the three documents they had initially sought judicial notice of and one
 14 added document—a NMFS press release—under the theory that review of their ESA claim is not
 15 limited to the Administrative Record. Smith Decl. Ex. 1. Under the scheduling order adopted by
 16 the Court, "if the Parties cannot resolve disputes regarding such extra-record documents
 17 Plaintiffs propose for consideration by the Court in adjudicating the ESA claim, Defendants will
 18 file a motion to resolve any such disputes." ECF No. 30 at 3. Federal Defendants therefore
 19 submit this motion to limit review to the Administrative Record.

20 **ARGUMENT**

21 **A. Plaintiffs' Claims Are Subject to the Scope and Standard of Review of the APA**

22 "[T]he Supreme Court has expressed a general rule that courts reviewing an agency
 23 decision are limited to the administrative record." *Lands Council v. Powell*, 395 F.3d 1019, 1029
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(9th Cir. 2005); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014) (collecting cases). This rule exists for good reason—it “ensures that the reviewing court affords sufficient deference to the agency’s action.” *Id.* Because all of Plaintiffs’ claims in this case are governed by the APA scope and standard of review, this Court’s role is to determine whether the agencies’ action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). In carrying out this role, Congress has directed that this Court “shall” consider the administrative records proffered by the defendant agencies. *Id.* § 706. Congress has made no provision for generation of extra-record evidence. Indeed, in APA record-review cases such as this, “there are no disputed facts that the district court must resolve.” *Occidental Eng’r Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). Rather, the Court’s role “is to determine whether or not as a matter of law the evidence *in the administrative record* permitted the agency to make the decision it did.” *Id.* (emphasis added).

The ESA provides a citizen-suit provision that authorizes a civil suit “to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.” 16 U.S.C. § 1540(g)(1)(A). This provision allows judicial review of claims against agencies alleged to have violated the ESA. *See Bennett v. Spear*, 520 U.S. 154, 174 (1997). After passage of the ESA, plaintiffs unsuccessfully argued that the citizen-suit provision eliminated the APA’s deferential standard of review based on the agency’s administrative record. This theory was first rejected in *Cabinet Mountains Wilderness/Scotchman’s Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 685 (D.C. Cir. 1982). There, the court declined to adopt the plaintiffs’ contention that the ESA’s citizen suit provision provided for de novo review, instead applying the rule that “in cases where Congress has simply provided for review, without setting forth the standards to be used or the

1 procedures to be followed, . . . consideration is to be confined to the administrative record and
 2 that no de novo proceeding may be held.” (*quoting United States v. Carlo Bianchi & Co.*, 373
 3 U.S. 709 (1963)).¹

4 The Ninth Circuit joined the D.C. Circuit and repeatedly held that the APA provides the
 5 judicial review standards that the ESA does not. *See, e.g., San Luis & Delta-Mendota Water*
 6 *Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (“Neither the ESA nor NEPA supply a
 7 separate standard for our review, so we review claims under these Acts under the standards of
 8 the APA”); *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 994 (“The ESA does not
 9 provide its own standard of judicial review, so we evaluate the [biological opinion] under the
 10 APA’s arbitrary or capricious standard.”); *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 691
 11 F.3d 1008, 1016 (9th Cir. 2012) (“We review Reclamation and FWS’s compliance with the ESA
 12 . . . under the standard set forth in the APA” (citation omitted)); *Ground Zero Ctr. for Non-*
 13 *Violent Action v. U.S. Dep’t of Navy*, 383 F.3d 1082, 1086 (9th Cir. 2004) (“Because neither
 14 NEPA nor the ESA contains an express provision for judicial review, our review of agency
 15 decision-making under these statutes is governed by the judicial review provisions of the
 16 Administrative Procedure Act. 5 U.S.C. § 706(2)(A)”); *Westlands Water Dist. v. U.S. Dep’t of*
 17 *Interior*, 376 F.3d 853, 865 (9th Cir. 2004) (“NEPA and ESA compliance is reviewed under the
 18 [APA], 5 U.S.C. § 706 et seq.”) (citations omitted); *City of Sausalito v. O’Neill*, 386 F.3d 1186,
 19 1205 (9th Cir. 2004) (“Because the statutes under which Sausalito seeks to challenge
 20 administrative action [including the ESA] do not contain separate provisions for judicial review,

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 22 _____
 23 ¹ This is also the rule in the Tenth Circuit. *Rio Grande Silvery Minnow v. U.S. Bureau of*
 24 *Reclamation*, 601 F.3d 1096, 1105 n.3 (10th Cir. 2010) (“The APA governs judicial review of
 agency action challenged through the ESA citizen-suit provision”).

1 our review is governed by the APA"); *Turtle Island Restoration Network v. NMFS*, 340 F.3d
 2 969, 973 (9th Cir. 2003) ("Judicial review of administrative decisions under the ESA is governed
 3 by Section 706 of the [APA]."); *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273
 4 F.3d 1229, 1235 (9th Cir. 2001) ("Judicial review of administrative decisions involving the ESA
 5 is governed by section 706 of the APA."); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of
 6 Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990) ("Judicial review of administrative decisions
 7 involving the ESA is governed by section 706 of the [APA]."); *Sierra Club v. Marsh*, 816 F.2d
 8 1376, 1385-87 (9th Cir. 1987) (reviewing ESA citizen-suit claim under APA's scope and
 9 standard of review); *Vill. of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984) ("Because
 10 ESA contains no internal standard of review, section 706 of the [APA], 5 U.S.C. § 706, governs
 11 review of the Secretary's actions."). This line of cases was recently reaffirmed by the en banc
 12 court. In *Karuk Tribe of California v. United States Forest Service*, 681 F.3d 1006 (9th Cir.
 13 2012) (*en banc*), the plaintiff brought an ESA claim against an action agency under the ESA's
 14 citizen-suit provision. Though it was an ESA citizen-suit case, the Ninth Circuit expressly noted
 15 that the action agency's "compliance with the ESA is reviewed under the [APA]" and that,
 16 "[b]ecause this is a record review case, we may direct that summary judgment be granted to
 17 either party based upon our review of the administrative record." *Id.* at 1017 (citations omitted).
 18 The en banc panel's ruling in *Karuk Tribe* should resolve Plaintiffs' request to introduce extra-
 19 record evidence here.

20 In sum, controlling Supreme Court and Ninth Circuit authority require that this Court use
 21 the APA's standards when resolving all of Plaintiffs' claims, including their ESA claim. The
 22 APA standards do not permit the introduction of extra-record evidence absent the application of
 23 a limited exception not applicable here. *See Lands Council*, 395 F.3d at 1029.

1 **B. The APA's Scope of Review Applies.**

2 In the APA, Congress expressly directed that, in making the necessary determinations in
 3 cases authorized for review, “the court shall review the whole record or those parts of it cited by
 4 a party.” 5 U.S.C. § 706. In the seminal case of *Vermont Yankee Nuclear Power Corp. v. Natural*
 5 *Resources Def. Council*, 435 U.S. 519 (1978), the Supreme Court emphasized that judicial
 6 review under the APA is ordinarily limited to the administrative record compiled by the agency.
 7 *Id.* at 549 (relying on *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam)); *see also* *Citizens to*
 8 *Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (noting “review is to be based on the full
 9 administrative record that was before the Secretary at the time he made his decision”) (footnote
 10 omitted).

11 The Ninth Circuit has similarly recognized that “[w]hen a plaintiff challenges a final
 12 agency action, judicial review normally is limited to the administrative record in existence at the
 13 time of the agency’s decision.” *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th
 14 Cir. 2000). More recently, the Ninth Circuit admonished a district court, in companion ESA
 15 rulings, for allowing and considering extra-record declarations when the plaintiffs had asserted
 16 both APA claims against the consulting agency and ESA citizen-suit claims against the action
 17 agency. *Jewell*, 747 F.3d at 601-04; *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 991-
 18 93, 996, 999-1000, 1009. In a lengthy discussion, the Ninth Circuit reminded district courts that
 19 judicial review in that class of cases “is limited to ‘the administrative record already in existence,
 20 not some new record made initially in the reviewing court.’” *Jewell*, 747 F.3d at 602 (*quoting*
 21 *Camp*, 411 U.S. at 142). The Ninth Circuit explained that “[t]here is a danger when a reviewing
 22 court goes beyond the record before the agency,” because “[w]hen a reviewing court considers
 23 evidence that was not before the agency, it inevitably leads the reviewing court to substitute its

1 judgment for that of the agency.” *Id.* at 602 (citations omitted). The Ninth Circuit has further
 2 explained that limiting review to the facts in existence at the time of the agency’s decision also
 3 prevents improper consideration of “[p]ostdecision information . . . as a new rationalization
 4 either for sustaining or attacking an agency’s decision.” *Nat’l Wildlife Fed’n v. U.S. Army Corps
 5 of Eng’rs*, 384 F.3d 1163, 1176 n.16 (9th Cir. 2004) (citation omitted).

6 Plaintiffs may argue that this Court can apply only the APA’s standard of review to their
 7 ESA claim, and not its scope of review, as some district courts have opined. But such a
 8 distinction conflicts with the plain language of the APA and controlling precedent that a
 9 reviewing court cannot properly apply the APA’s standard of review if it does not adhere to its
 10 scope of review. This is because the APA contains both a standard and a scope of judicial
 11 review. The plain language of the APA states:

12 [STANDARD OF REVIEW:] [T]he reviewing court shall . . . hold unlawful and
 13 set aside agency action, findings, and conclusions found to be arbitrary,
 capricious, an abuse of discretion, or otherwise not in accordance with law . . .

14 [SCOPE OF REVIEW:] *In making the foregoing determinations*, the court shall
 15 review the whole record or those parts of it cited by a party.

16 5 U.S.C. § 706 (emphasis added).

17 A court does not follow this direction if it determines whether the challenged agency
 18 action is arbitrary and capricious or not in accordance with law based on extra-record evidence.
 19 And ESA citizen-suit claims are no exception, as other courts have held. *See, e.g.*, 350 Mont. v.
 20 *Bernhardt*, 443 F. Supp. 3d 1185, 1201 (D. Mont. 2020); *Pac. Rivers Council v. Shepard*, No.
 21 03:11-CV-442-HU, 2012 WL 950032, at *3 (D. Or. Mar. 20, 2012) (finding “the APA standard
 22 of review governs a plaintiff’s citizen suit for failure to consult under ESA § 7,” reciting the
 23 APA’s scope of review, and noting “[t]he ESA citizen-suit provision does not provide

1 otherwise.”). These cases accord with controlling Supreme Court precedent that has expressly
 2 stated that, in applying the APA’s arbitrary and capricious standard, “the focal point for judicial
 3 review should be the administrative record already in existence, *not some new record made*
 4 *initially in the reviewing court.*” *Camp*, 411 U.S. at 142 (emphasis added); *Overton Park*, 401
 5 U.S. at 416-20; *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985).

6 **C. *Karuk Tribe* Is the Law of this Circuit, Consistent with Supreme Court Authority
 7 and More than Three Decades of Ninth Circuit Authority**

8 Plaintiffs informed the Federal Defendants that they plan to argue that judicial review of
 9 their ESA claim is not limited to the administrative record. Ex. 1. Plaintiffs’ theory relies on an
 10 overly broad reading of the Ninth Circuit’s decisions in *Washington Toxics Coalition v. EPA*,
 11 413 F.3d 1024 (9th Cir. 2005), and *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472,
 12 476 (9th Cir. 2011). At the outset, *Karuk Tribe*, 681 F.3d 1006, as an en banc decision, provides
 13 the controlling law of this Circuit and should resolve any reliance by Plaintiffs on *Washington*
 14 *Toxics* or *Kraayenbrink* (which also predate *Karuk Tribe*). In fact, *Karuk Tribe* agreed with at
 15 least eleven Ninth Circuit rulings that ESA claims are governed by the APA’s standards, as noted
 16 above. As neither *Washington Toxics* nor *Kraayenbrink* were decided en banc, even if one or
 17 both decisions had held that ESA citizen-suit claims are not governed by the APA’s standards,
 18 which they do not, neither decision could overrule the 35 years of contrary Ninth Circuit
 19 authority. See *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996) (per curiam) (a panel of the Ninth
 20 Circuit “may not overrule a decision of a previous panel; only a court in banc has such
 21 authority”) (citation omitted).

22 In any event, the Ninth Circuit did not rule in either *Washington Toxics* or *Kraayenbrink*
 23 that ESA citizen-suit claims are not record review claims. Indeed, it is inconceivable that the

1 panel in either *Washington Toxics* or *Kraayenbrink* would have attempted to overrule more than
 2 three decades of contrary Ninth Circuit precedent and create a split with the Tenth and D.C.
 3 Circuits, without even mentioning a single one of those decisions, or a single Supreme Court
 4 authority on record review. In *Washington Toxics*, the court considered whether the plaintiffs
 5 had stated a claim upon which relief could be granted under the ESA citizen-suit provision. A
 6 defense had been raised that the plaintiffs had not stated a claim because they had not identified a
 7 discrete “agency action” that triggered the consultation requirement of ESA Section 7, but were
 8 attempting to assert an improper programmatic attack on the Environmental Protection Agency’s
 9 (“EPA’s”) pesticide registration program for alleged failure to consult. The Ninth Circuit
 10 rejected the defense, finding that the plaintiffs had, in fact, stated a claim that EPA had violated
 11 ESA Section 7(a)(2), which could be brought under the ESA’s citizen-suit provision. Because
 12 the court found that the ESA authorized review of the claim, it found that the APA did not.
 13 *Wash. Toxics*, 413 F.3d at 1034. The court noted that “suits to compel [action] agencies to
 14 comply with the substantive provisions of the ESA arise under the ESA citizen suit provision,
 15 and not the APA.” *Id.* That statement did not break new ground. It is consistent with the
 16 Supreme Court’s holding in *Bennett* and the plain language of the APA, which states that it
 17 authorizes review of “final agency action for which there is no other adequate remedy in a
 18 court.” 5 U.S.C. § 704 (emphasis added). In short, *Washington Toxics*’ holding that an alleged
 19 violation of the ESA by an action agency is authorized for review under the ESA’s citizen-suit
 20 provision, and not the APA’s waiver of immunity, is unremarkable. *Washington Toxics* did not
 21 consider the scope of review for ESA claims *at all*.

22 *Kraayenbrink* involved the Secretary of the Interior’s issuance of amendments to the
 23 Bureau of Land Management’s (“BLM’s”) grazing regulations. *W. Watersheds Project*, 632

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1 F.3d at 476. Plaintiffs in that case successfully challenged the amendments on ESA grounds,
 2 among others. *Id.* BLM did not appeal the district court's decision. *Id.* But intervenor-
 3 defendants pressed on with the appeal, even in the absence of the agency, which had accepted the
 4 district court's remand. *Id.* In their prosecution of the appeal, intervenor-defendants argued that
 5 the district court had impermissibly admitted extra-record declarations submitted by the
 6 plaintiffs. The *Kraayenbrink* court correctly noted that “[b]ecause ESA contains no internal
 7 standard of review, section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, governs
 8 review” *Id.* at 496 (quoting *Vill. of False Pass*, 733 F.2d at 609–10). The court added,
 9 however, that, along with considering the administrative record, “we may consider evidence
 10 outside the administrative record.” *Id.* at 497. Specifically, the court approved of the district
 11 court's consideration of extra-record declarations submitted by the plaintiff together with the
 12 administrative record because they showed information that “the [agency] failed to consider.” *Id.*
 13 at 498. The consideration of these extra-record declarations accords with one of the four narrow
 14 exceptions to the APA's whole record rule that have been recognized by the Ninth Circuit for at
 15 least 25 years—materials necessary to determine whether the agency has considered all relevant
 16 factors and has explained its decision. *See, e.g., Sw. Ctr. for Biological Diversity v. U.S. Forest*
 17 *Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996); *see also Camp*, 411 U.S. at 142–43; *Friends of the*
 18 *Payette v. Horseshoe Bend Hydroelec. Co.*, 988 F.2d 989, 997 (9th Cir. 1993).

19 It is true that some district courts and even a panel of the Ninth Circuit have relied on the
 20 out-of-context statement in *Kraayenbrink* for the proposition that the normal rules of
 21 administrative record review do not apply when courts review cases brought under the ESA's
 22 citizen suit provision. *See Nat'l Fam. Farm Coal. v. U.S. Env't Prot. Agency*, 966 F.3d 893, 926
 23

1 n.11 (9th Cir. 2020).² But *Kraayenbrink* cannot stand for this proposition—such an
 2 interpretation would entail overturning 35 years of controlling law and ignore the later en banc
 3 ruling in *Karuk Tribe*, 681 F.3d at 1017.

4 *Kraayenbrink* cites a single authority for its administrative record holding: *Washington*
 5 *Toxics*. Instead, as a court in this District has held “[i]n both *Kraayenbrink* and *Washington*
 6 *Toxics*, the issue before the Ninth Circuit was whether the district court had properly allowed the
 7 parties to *supplement* the record with expert opinions and studies.” *Sierra Club v. McLellan*,
 8 No. C11-1759RSL, 2012 WL 5449681, at *2 (W.D. Wash. Nov. 6, 2012) (emphasis added).
 9 “While the Ninth Circuit ratified the district courts’ use of discretion in those cases to
 10 supplement the record, it is a far cry to state that those cases require a district court to engage in
 11 *de novo* review of the record, or that the APA’s standards are inapt guidelines.” *Id.* Understood
 12 in the proper context, *Kraayenbrink* simply stands for the unremarkable proposition that a district
 13 court may allow supplementation of the record under the recognized exceptions to the record
 14 review rule articulated in *Lands Council*, 395 F.3d at 1029.

15 **D. The Court Should Not Exercise its Discretion to Supplement Here.**

16 This Court should not exercise its discretion to supplement the record with the documents
 17 offered by the Plaintiffs. First, during the lengthy conferral over the contents of the
 18 administrative record and the potential admission of any extra-record document, Plaintiffs never
 19 suggested that one of the four exceptions to administrative record review applied. Smith Decl.,
 20 Ex. 1. Any such argument should be deemed waived.

21
 22 ² In *Nat'l Fam. Farm Coal.*, 966 F.3d at 926 n.11, the court made its statement about the scope
 23 of review *sua sponte*, without any briefing from the parties. Such a brief statement cannot
 24 overrule the earlier rulings of the Ninth Circuit, the en banc court, or the Supreme Court.

1 Furthermore, the documents put forward by Plaintiffs are not appropriate for
2 supplementation or consideration even if they were timely raised. First, Plaintiffs ask for
3 admission of a 2014 biological opinion prepared by NMFS on a *different* nationwide permit
4 rulemaking and a press release issued by the NMFS. Ex. 1. Both these documents were
5 available during the comment period on the Corps' proposed rule for NWP 56. If Plaintiffs
6 believed these documents were relevant to the Corps' consideration of NWP 56, they could have
7 submitted them to the Corps during the notice and comment rulemaking. They did not.
8 Plaintiffs should not now have the opportunity to ask the Court to review the Corps' decision
9 based on evidence they failed to provide to the Corps when they had the opportunity. In
10 addition, under Federal Rule of Evidence 402, Plaintiff must, at a minimum, demonstrate that the
11 evidence they offer is relevant. A decade-old biological opinion for an entirely different permit
12 and a press release cannot meet the relevancy standard.

13 Second, the remaining two documents (atlases issued by NMFS) postdate the Corps'
14 decision on NWP 56. These documents were unavailable for consideration by the Corps and
15 therefore cannot serve as the basis for a ruling on whether the Corps' decision was arbitrary and
16 capricious. They cannot meet the test for relevancy nor are they an appropriate basis for
17 reaching a decision under the APA.

18 **CONCLUSION**

19 For the foregoing reasons, the Court should issue an order confirming that its review will
20 be limited the administrative record previously lodged by the Corps.

22 Dated: September 27, 2023

Respectfully submitted,

23 TODD KIM

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26 **WORD COUNT CERTIFICATION**

27 I certify that this memorandum contains 4,112 words, in compliance with the Local Civil Rules.

28 /s/ Maggie Baker Smith
29 MAGGIE BAKER SMITH

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon counsel of record using the CM/ECF system on September 27, 2023.

/s/ Maggie B. Smith